ADMINISTRATIVE JUSTICE IN ITALY: MYTHS AND REALITY

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Abstract

The question of whether it is still possible to justify the existence of the "special jurisdiction" of the administrative court recurrently arises in Italian studies on administrative justice. In this perspective, this study examines three related questions: first, the presumed need to fully implement the Constitutional principle of jurisdiction's unity; second, whether the Constitutional historical reasons that have so far justified the existence of a special jurisdiction have been superseded; third, whether the system of protection against the public administration that has to be enforced by administrative courts according to the law is still suitable, that is, of potential incompatibility of current enforcement system with the changes in the modern civic society and the features of the post-industrial economy in a global context.

TABLE OF CONTENT

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1. A necessary premise

In Italian studies on administrative justice, the question regularly arises of whether it is still possible to justify the existence of the "special jurisdiction" of the administrative court[1]; in other words, but question in reality is the same, it is not time to move towards the unification of jurisdiction for all disputes involving the public administrations[2].

Recently too, inspired by conferences and study meetings, many thoughtful reflections have been provided by scholars of administrative[3] and Constitutional law[4] who are once again focusing on the "reasons for the existence of such a court"[5].

Significantly these renewed reflections run alongside, and we ought to be fully aware of this, a series of interventions by authoritative political figures who, for reasons that are very different to those that inspire legal scholars, have recently repeatedly questioned the utility of administrative justice and, indeed, have challenged its very existence, considering the legitimacy this court has been granted for over a century to be an unacceptable obstacle to Italy's economic development and a brake on its growth[6].

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[1] Our thoughts turn immediately to M. Nigro, *E' ancora attuale una giustizia amministrativa?*, Foro It. 249 (1983).

[2] Cf. the beautiful writings of G. Pastori, *Per l'unità e l'effettività della giustizia amministrativa*, Riv. dir. proc. 921 (1996) and A. Travi, *Per l'unità della giurisdizione*, Dir. pubbl. 380 (1998).

[3] Above all the writings of R. Villata, *Giustizia amministrativa e giurisdizione unica*, Riv. dir. proc. 287 (2014), speech to a conference at the Avvocatura Generale dello Stato (Rome, December 2013), and L. Ferrara, *Attualità del giudice amministrativo e unificazione delle giurisdizioni: annotazioni brevi*, Dir. pubbl. 561 (2014). Speech on the occasion of the presentation of the *Terzo rapporto sulla giustizia civile in Italia* "*Semplificazione ed unificazione dei riti nella prospettiva dell'unificazione della giurisdizione*", Unione Nazionale Camere Civili, Rome (Aula magna of the Court of Cassation), March 2014.

[4] F.S. Marini, *Unità e pluralità della giurisdizione nella Costituzione italiana*, Giustamm.it (2014). Speech on the occasion of Conference organised by the Supreme Court of Cassation, *Unità e pluralità della giurisdizione. Presupposti costituzionali e prospettive di riforma*, Rome (Aula magna of the Court of Cassation), October 2014.

[5] To quote L. Ferrara, *Attualità del giudice amministrativo*, cit. at 3, 561.

[6] Consider the intervention of Romano Prodi, *Abolire Tar e Consiglio di Stato per non legare le gambe all'Italia*, an article that appeared in *Il Messaggero*, *Il Mattino* and *Il Gazzettino* on 11 August 2013. But the issue has since been taken up by the Prime Minister Matteo Renzi on various occasions, from an interview in

Thus there is more than one reason for addressing this issue, and in the same way there is more than one point of view to consider in studying the issue.

However, three points appear to be the most significant:

the first relates to the need, mentioned by various parties, to fully implement the Constitutional principle of unity of jurisdiction, on the assumption that the specialty of the administrative court is unjustified (an assumption always accompanied by a more or less explicit suspicion regarding the lack of guarantee of independence ensured by this court and thus offered in turn to the users of the justice system);

a second regards establishing whether or not the historical reasons that for a certain period of time – in our Constitutional legal system – justified the existence of a special jurisdiction have been superseded, and which, in the same way as the transitory provisions of the Constitution, are the only reasons that justify this temporary derogation for this special jurisdiction;

a third, finally, concerns a verification of the suitability today of the system of protection against the public administrations that the law assigns (only) to the administrative court, that is, of its incompatibility with the needs of a modern civic society and a post-industrial economy in a global context[7].

What follows here will focus carefully on these points and seek to show in a reasoned way the (always provisional) conclusions that will be reached. It is necessary, however, to warn the reader from the outset that the subject under investigation in this study is populated, and certainly not just recently but at least since it was passionately debated within the Constituent Assembly (but even earlier in the late nineteenth-century debates between the historical Left and Right), by a host of mythological

November 2013, in which he declared "abolishing the TAR and administrative justice, unifying the jurisdictions, would mean an additional two points of GDP" (*Servizio pubblico*, La7, November 8, 2013); on this point cfr. *Matteo Renzi alla guerra dei Tar*, in formiche.net, 22 April 2014.

[7] This being a perspective that is taken in these pages within the logic of administrative law (to use the words of G. Napolitano, *La logica del diritto amministrativo* (2014), aware of the existence of a wider, supranational perspective, and its extraneousness to the topic under consideration. Cfr., above all, S. Cassese, *I tribunali di Babele. I giudici alla ricerca di un nuovo ordine globale* (2009).

figures[8] which ensure a very bumpy ride for the jurist who – by definition – has to distinguish the real from the myth.

2. Unity of jurisdiction and Article 103 of the Constitution

Going in order through the various myths it is opportune to start with the myth of the uniqueness of jurisdiction which is often made to coincide with the Constitutional principle of the unity of jurisdiction.

Unity and uniqueness of jurisdiction are not the same thing and only the former is a Constitutional principle; the aspiration for uniqueness, instead, is merely a legitimate political goal, albeit one with noble cultural and ideological roots. A study of Article 103 of the Constitution, also in the light of Constitutional case law on the issue, is very helpful in seeing this.

The provisions of Article 103 of the Constitution is related to the provisions that precede or follow it in the Constitutional text. This reference is in particular to Article 24 of the Constitution which ensures the entitlement to take legal action to protect individual rights and legitimate interests; Article 100, which grants Constitutional weight to the Council of State and the Court of Auditors; Articles 101 and 102, which establish the principle of the unity of jurisdiction; Article 108, according to which "the law ensures the independence of judges of special courts" (in the second paragraph); Article 111 which, again in the second paragraph, ensures the principle of a fair trial in "equal conditions before an impartial judge in third party position"; and Article 113, which ensures judicial protection (ordinary or administrative) against the acts of the public administration. In terms of these provisions, however, the first two paragraphs of Article 103 are placed in a position of absolute pre-eminence. It is, in fact, Article 103 of the Constitution that has provided sufficient Constitutional

[8] No disrespect is intended with the reference to mythology, when comparing real problems and issues that while fascinating are not reflected in legal reality. We also refer here to the words of Santi Romano (*Mitologia giuridica*, in *Frammenti di un dizionario giuridico* (1947), 126. And indeed, while the ability to hover in legal mythology, in Romano's sense, is not common, it cannot predicate for all the poverties, but only for those that assume the appearance of "wonderful imagination" or a "belief that has the character of faith" (the quotes are at 127 and 128).

"cover" to the "Council of State and the other organs of judicial administration"[9], as well as to the criteria for the allocation of judicial functions between the different orders of courts called on to exercise it historically, albeit in the uniqueness of the same function sanctioned – as we are well aware – by Article 101 of the Constitution.

The Constituent Assembly, in reality, crystallised in Article 103 of the Constitution the difficult balance that in the early part of the last century had been achieved in dividing the exercise of judicial function between the ordinary court, the court of civil and political rights since the law abolishing administrative litigation, and the administrative court, the court of legitimate interests since it was founded with the law establishing the IV Section of the Council of State. This balance was achieved after a sharp oscillation between the one-tier system of judicial function entrusted solely to the ordinary court (a system supported by the majority of the historical Right of Mancini, Minghetti, Boncompagni and Borgatti that came to fruition in the law abolishing administrative litigation) and the two-tier system characterised precisely by the division of jurisdiction between different orders of courts (following the change in opinion brought about by Silvio Spaventa in his famous speech in Bergamo and adopted by the Crispi Ministry with the law establishing the IV Section of the Council of State[10]).

This is not the place to dwell on the evolution of doctrine and case law which has characterised the theme of administrative jurisdiction and its court and, connected to this, the division of jurisdiction[11]. The debate in question is the fruit of and is nourished not by the Constitutional provision, or the preparatory

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[9] For an updated commentary on Articles 100, 103, 111 and 113 of the Constitution, cfr. above all G. Cerrina Feroni, *La giustizia amministrativa nella Costituzione*, in G. Morbidelli (ed.), *Codice della Giustizia amministrativa* (2015), 3.

[10] The speech has been published on various occasions, most recently in S. Spaventa, *La giustizia amministrativa* (1993), 41 (edited by S. Ricci). On this point, also for a complete picture of the different situations compared, cfr. M. Nigro, *Le varie esperienze di giustizia*, in Id. (ed.), *Giustizia amministrativa* (2002), 33. The debate on the establishment of Section IV is described in more detail by N. Paolantonio, *L'istituzione della IV Sezione del Consiglio di Stato attraverso la lettura dei lavori parlamentari* (1991).

[11] The centuries-old debate on the subject has been reconstructed by F.G. Scoca, *Riflessioni sui criteri di riparto delle giurisdizioni*, Dir. proc. amm. (1989).

work behind the same, but by the rules that were intended to regulate the matter[12] prior to the unification of the Kingdom of Italy. Article 103 of the Constitution limits itself to incorporating and consolidating the fruits of that debate and to re-proposing and "constitutionalising" the jurisdictional function of the Council of State and the other organs of administrative justice, as well as a division of jurisdiction which, overcoming the one-tier setting affirmed with the abolition of administrative litigation, adopts the dualistic solution of the distinction of jurisdictions based on the different nature and consistency of subjective legal situations of legitimate interest and individual right.

And it is very much the clear intent of Article 103 of the Constitution to greatly limit the scope and consistency of the doubts on and disputes over the constitutionality of the entire system of administrative justice and the jurisdictional reserve assured to it[13]. While, in fact, it is more than possible, from a perspective of legal policy, to wonder about the appropriateness and benefits of a change in the Constitutional framework on the point and the adoption of a different one-tier model[14], it is important to always avoid that such assessments of political expediency should obtain nourishment from a mistaken reading of the current Constitutional framework.

And this is so true that even the case law of the Constitutional Court has rarely dealt with the issue of administrative jurisdiction and its division (while it has investigated much more often the theme of the efficacy of the legal protection offered by the administrative court).

And indeed, if such a crystallised criterion of division, that between rights and interests, were the only criterion of division foreseen by Article 103, the theme of administrative jurisdiction

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[12] It is still worth returning to the pages of M. Nigro, *La formazione del sistema italiano di giustizia amministrativa*, in Id. (ed.), *Giustizia amministrativa*, cit. at 10, 55 and of F.G. Scoca, *La genesi del sistema delle tutele nei confronti della pubblica Amministrazione*, in Id. (ed.), *Giustizia amministrativa* (2014), 3. This is a work which harks back to an earlier work by the same author, *Linee evolutive della giustizia amministrativa*, in *Annali della Facoltà di Giurisprudenza* (1977), 373.

[13] On which we cannot but agree with R. Villata, *Giustizia amministrativa e giurisdizione unica*, cit. at. 3, 287.

[14] This, for example, is what can be seen in L. Ferrara, *Attualità del giudice amministrativo e unificazione delle giurisdizioni: annotazioni brevi*, cit. at 3, 561.

would never have been a subject of interest for the Constitutional Court. If the division of jurisdiction – and hence the delimitation of the borders of administrative jurisdiction – had found its exclusive basis in the Constitutional provisions that refer to the distinction of subjective legal situations, the issue of administrative jurisdiction and its related disputes would have had to be limited to the cognition of the court of the jurisdiction, namely the Court of Cassation in Joint Session.

As is well known, however, Article 103 of the Constitution, again to leave unaltered the delicate balance achieved in the field before the advent of the Republican Constitution, alongside the general principle of apportionment based on the nature of the subjective legal situations in dispute, also provided an alternative criterion of special character. A special criterion that allowed the ordinary legislator, notwithstanding the general rule, to establish the exclusive jurisdiction of the administrative court (but implicitly also that of ordinary court) in "particular matters", regardless of whether what is in dispute are situations of individual rights or legitimate interests. It is precisely this discretionary margin left to the legislator by the Constituent Assembly in the demarcation of "particular matters" of exclusive jurisdiction which led to the Constitutional Court dealing with the scope and extent of administrative jurisdiction on various occasions.

And this is both to verify compliance with the Constitutional limit of "particular matters" which alone justifies the derogation from the general rule of apportionment based on subjective situations; as well as and above all to ensure that the discretionary choice of the legislator did not enter into conflict with the principles of equality, independence of judicial power and fullness of the relative protection ensured by Articles 3, 24, 108 and 111 of the Constitution. In fact, the very Constitutional provision that enables the ordinary legislature to reserve the protection of equal subjective legal situations (individual rights or legitimate interests) to the exclusive cognisance of different jurisdictions (the traditional exclusive jurisdiction of the administrative court or new hypothesis of an "exclusive" jurisdiction of the ordinary court), has allowed the legislature to choose to assign to one jurisdiction rather than the other individual legal situations of the same consistency.

And this is precisely the dual track along which runs all Constitutional case law in terms of administrative jurisdiction: on one side, the track constituted by the parameter of judgment provided by Article 103 of the Constitution as regards the limits to legislative discretion in identifying particular matters of exclusive jurisdiction; on the other, the track built on the parameter of the equality, independence and effectiveness of the legal safeguards guaranteed to individual legal situations of equal consistency.

Thus is becomes evident that precisely because of these Constitutional provisions, it was never assumed that the two-tier system on which jurisdiction in relation to the public authorities is built might be contrary to the principle of jurisdictional unity: a unity which essentially was never declined, in the Constitution, in terms of uniqueness[15]. In bringing up, then, the subject of a possible reform of the Constitutional system of jurisdiction from the point of view of its unification it is necessary to decline the real needs which justify or require such significant reform.

Well, in older and more recent writings on the subject, the only significant requirement that is made explicit in a different way is based on a supposed "original sin" of the administrative court. This court, as noted, was born in the sphere of the administration and not in that of the jurisdiction; when in 1889 the functions of justice "in the administration" were attributed to a Section of the Council of State it was decided to introduce a guarantee that was not judicial even though its nature related to justice[16].

From that source what continues to come down to this day are:

a) the closeness of this court to, or rather its "contiguity with" executive power;

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[15] This position is as obvious as it is often obliterated or unspoken. On this point R. Villata is very clear in *Giustizia amministrativa e giurisdizione unica*, cit. at 3, 287, which also criticises the ambiguity of certain case-law tendencies of the Cassation as the court of jurisdiction (293 ff.), or, if we prefer, but these are my words, as the propulsion (or promoter) of (or towards) a single jurisdiction.
On this point, for further discussion, cf. once again R. Villata, "*Lunga marcia" della Cassazione verso la giurisdizione unica ("dimenticando" l'art. 103 della Costituzione)?*, in Dir. proc. amm. 324 (2012).

[16] This is the position of the whole of the Orlando school, above all cfr. its founder, V.E. Orlando, *La giustizia amministrativa*, in Id. (ed.), *Primo Trattato completo di diritto amministrativo italiano* (1907), 818.

b) its structural "amenability" with respect to reasons of public interest at the expense of the protection of individual legal rights;

c) the commingling of roles and judicial and advisory (or even administrative) functions[17].

All this would help to fuel an incurable weakness in the Constitutional guarantee of the independence and impartiality of the administrative court, or at least a weakness in the image of said court as independent and impartial[18].

Only a verification of the real consistency of these fears, of the actual correspondence to reality of these "deadly sins", of the possible disastrous impact of this conditioning on the exercise of the judicial function will allow (or not) support for the proposed amendments to the current system of safeguards against the public administrations. It also has to be asked whether these problems, always assuming they are significantly consistent, are the most real and pressing problems of administrative justice, those that most urgently require the intervention of the legislature and even of the legislature at Constitutional level.

In answering these recurring questions, doctrine has inevitably been inspired and influenced by cultural options and ideals, by value judgments, by current events (rather than history), and consequently it is only natural that conclusions have been suggested that are questionable by their very nature. What comes to mind is the warning that one of Italy's leading humanists placed on the lips of St. Bernardine of Siena: "Not everything that has been written is worthy of faith. Certainly the canonical scriptures (the Constitution, for us) have undoubted authority. But in other cases it is always necessary to inquire about who the writer was, their life, their beliefs, the importance of what they said; with what you agree and with what you disagree, if they say things that are plausible, if the things you read coincide with the

[17] Cfr. the work of A. Travi, *Il consiglio di stato tra giurisdizione ed amministrazione*, Dir. pubbl. 505 (2011).

[18] For an articulation of these issues, cfr. L. Ferrara, *Attualità del giudice amministrativo e unificazione delle giurisdizioni: annotazioni brevi*, cit. at. 3, 561, spec. 581.

places and times. We should not simply believe a speaker or writer"[19].

Applying this wise maxim to the issue before us we can see, for example, how as regards the criticism about the closeness, or rather the "contiguity" of the administrative court to executive power, it can easily be replied that this situation, if it was true in a certain period of the history of the Republic, was much less so in the sad season of the corporative order[20], or in the recent past characterised by a completely opposite trend, both for a substantial preclusion and rigid barrier to the collaboration of administrative judges on the political staff, as a result of a declared intolerance of executive power for the administrative court (and even more for the weight of their destructive controls)[21]. And indeed this significant intolerance of the executive at both state and regional level, as well as in terms of local authorities, would seem to clearly contradict the supposed structural "amenability" of the administrative court with respect to the reasons of public interest. Even the complaints about the mixing of roles in the ownership of the judicial and advisory functions could be considered the result of a doctrinaire overestimation only if examined from a comparative perspective in the light of the case law of the European High Courts compared to the analogous institutions in the countries of the European Union[22].

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[19] The passage comes from Enea Silvio Piccolomini (later Pope Pius II), *Dialogus de somnio quodam* (datable to around 1453-1454), finally published in an admirable critical translation in Italian, in A. Scafi (ed.), *Dialogo su un sogno* (2004). The quote is from page 186.

[20] Crf. among others, G. Melis, *Il Consiglio di Stato ai tempi di Santi Romano*, Speech at the conference "*Il Consiglio di Stato durante la presidenza di Santi Romano*" (Rome, February 2003), in *giustizia-amministrativa.it* and then more widely Id., *Fare lo Stato per fare gli italiani* (2015), especially in the second part of the work *Quanto è stato fascista lo Stato fascista*, ch. VIII, *Il Consiglio di Stato: note sulla giurisprudenza* and ch. IX *La giurisdizione sul rapporto di impiego negli enti pubblici e il ruolo di Santi Romano.*

[21] We have already mentioned the interventions of Romano Prodi, *Abolire Tar e Consiglio di Stato*, cit. at 6, and Prime Minister Matteo Renzi on several occasions in this legislature (cit. at 6).

[22] On this point an efficacious synthesis can be found in the study by S. Mirate, *L'indipendenza e la imparzialità del giudice amministrativo. Un'analisi problematica tra diritto interno e giurisprudenza CEDU*, in A. Sandulli & G. Piperata (ed.), *Le garanzie delle giurisdizioni. Indipendenza ed imparzialità dei giudici* (2012), 78 and in

It is precisely the debatable nature of the opposing doctrinal visions which suggests to us that we should not set out on the same path in formulating an additional position in this debate populated by highly respectable and often compelling value judgments. As mere jurists it was thought more useful to put forward a number of conclusions on the issue while remaining anchored to the decisions of the Constitutional Court which has been asked, mostly at the request of the ordinary court, to address the issue of the inadequacy of the guarantees of independence and impartiality of the administrative court.

3. Is the Constitutional guarantee of the jurisdiction of the administrative courts still justified?

We need to point out how the examination of the Constitutional Court regarding administrative jurisdiction is often (though not always) preceded by a reasoned and argued premise, almost a warning with respect to the doubts which the ordinary courts sow cyclically in their orders for referral.

The Constitutional Court, in fact, repeatedly recalls that Article 103 is not only the main Constitutional guarantee of the jurisdiction of the administrative court but, at the same time, represents a solid bulwark against all the attempts advanced in doctrine in favour of a "non-administrative justice"[23] and which fight for a return to the one-tier system and the uniqueness of the order exercising the judicial function[24].

Moreover, the entirely political goal of rebuilding jurisdiction in monistic terms, and thus ensuring the unity of the judicial role also at the level of the judicial orders called on to exercise it, was a goal – openly pursued by some members of the

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the reflections of M.P. Chiti, *La giustizia amministrativa serve ancora?*, 35 Astrid Rassegna (2006).

[23] The noblest of which is to be found in the beautiful pages of A. Orsi Battaglini, *Alla ricerca dello Stato di diritto. Per una giustizia "non amministrativa"* (2005). For a comment cfr. 1 Dir. pubbl. (2006), with writings by G. Silvestri, *Un libro che fa 'respirare'*, 61; F.G. Scoca, *Un pensatore generoso*, 69; A. Travi, *Rileggendo Orsi Battaglini*, 91; G.U. Rescigno, *La tutela dei diritti soggettivi e degli interessi legittimi secondo la Costituzione italiana (dialogando con Andrea Orsi Battaglini a proposito del suo libro Alla ricerca dello Stato di diritto*, 111.

[24] Cfr. A. Orsi Battaglini, *Alla ricerca dello Stato di diritto. Per una giustizia "non amministrativa"*, cit. at 23, 33.

Constituent Assembly – that never met with a widespread consensus. As the work of the Constituent Assembly reveals, in fact, beyond even the authoritative voice of Piero Calamandrei, these positions remained very much in an isolated minority, and specifically led to ensuring the administrative court full membership of the constitutional Republican system.

Ample evidence of this is also provided by sentence no. 204/2004. In the first part of the reasoning behind this ruling, in fact, the Court recalls how the Constitution "recognised to the administrative court the full dignity of the ordinary court for the protection of individuals" with a legitimate interest "against the public administration". By now this should be fully accepted, but questions of constitutionality that have also been raised again recently have made this clarification necessary, just as they have made it necessary to recall the scope of the Constitutional principle of the unity of jurisdiction which, in the words of Mortati, the Court recalls consists of a "a unity that is non-organic, but functional in its jurisdiction, which does not exclude, but rather implies, a division of the various orders of judges in different systems, in autonomous systems". In essence, the Constitutional Court, even as it recalls the interventions of Calamandrei, seems to decisively and firmly debunk the myth of the unity of jurisdiction and does so from a perspective of enriching legal safeguards for individuals and the effectiveness of protection that evidently prizes the teaching of Vittorio Bachelet and his unforgotten work[25].

Again from this perspective we should read that part of the sentence no. 204/2004[26] which examines the power given to the administrative court to grant claims for damages by means as well of reinstatement in a specific form. In making an exception to the declaration of unconstitutionality of Article 35 of Law by Decree no. 80 of 1998 (replaced by Law no. 205 of 2000), the Court underlines how the attribution to the administrative court of compensatory protection constitutes "a tool of further protection, compared to the traditional destructive and/or conformative model, to be used to provide justice to the citizen against the public administration". And the assignment of this judicial power

[25] V. Bachelet, *La giustizia amministrativa nella Costituzione italiana* (1969).
[26] Reference is made to par. 3.4.1.

is justified by the Constitutional Court, not only in the fullness of the "dignity of the court" that is recognised to the administrative court, but also in the need for fullness in the judicial protection of individuals. In fact, the Court acknowledges that it "is rooted in the provision of Article 24 of the Constitution, which guaranteeing full and effective protection to individuals in the administrative jurisdiction, implies that the court is able to provide adequate protection".

These are, moreover, conclusions that the Constitutional Court itself had already provided in the past[27] and which are reaffirmed very clearly where it is recalled that "Article 24 of the Constitution ensures to legitimate interests the same guarantees ensured to individual rights and the possibility of exercising them before the court and the effectiveness of the protection the court must assure them of". But we will return to this subject (cf. below)

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[27] Think of the judgment of Vincenzo Caianello, Constitutional Court no. 177/1995, regarding third-party proceedings in the administrative process. For further reading, cfr. A. Police, *L'opposizione di terzo nel processo amministrativo: la Corte costituzionale anticipa il legislatore*, I-1 Giur. it. 512 (1995). But, in fact, these are recurring affirmations, particularly in relation to all the doubts about constitutionality raised with reference to the lack of fullness and effectiveness of the protection of the administrative court as the exclusive court for individual rights in public employment before privatisation. Cfr. in particular the judgments of the Constitutional Court no. 47/1976, n. 43/1977 and n. 100/1979 (followed by the ordinances of manifest lack of foundation no. 23 and n. 90/1980), on the allocation and revocation of public housing allocation. Cf. also the judgments of rejection no. 140/1980, regarding compulsory recruitment in the public administrations, no. 185/1981, regarding the liquidation of severance pay for state employees, and no. 208/1984, regarding disciplinary actions against personnel of the railways, tramways and inland waterways under concession, which referred substantially to what had been decided as regards public employment with judgments no. 47/1976 and no. 43/1977. More recently, the question has again been repeatedly raised of the constitutionality of the attribution to the administrative court of disputes about disciplinary action against the so-called *autoferrotranvieri* (rail transport workers), a group who now work increasingly in the private (or at least formally private) sector rather than for public bodies, but the Court has continued to declare it unfounded, even after the assignment to the ordinary courts of the majority of disputes on privatised relationships in the public sector (including those relating to disciplinary sanctions), continuing to point out, so far as it is relevant here, that the protection offered before the administrative court is not, in principle, "less valid" or "less advantageous or rewarding" than that available in the ordinary court (cf. adverse judgment no. 62/1996 and the ordinances of manifest lack of foundation no. 161/2002, 439/2002 and 301/2004).

in terms of the jurisdiction of the administrative court in terms of action for compensation for damage to legitimate interests.

That the system of administrative justice was pointing towards full jurisdiction was an acquisition that doctrine had reported at the first appearance of the legislative novelties and case law of the turn of the century[28]. Today the Constitutional Court has recognised that path as being fully complete and puts a substantial brake on any hypothesis of a return to the past. Independently of the reference to Article 35 of Law by Decree no. 80/1998 and therefore to the hypothesis of exclusive jurisdiction, the Court in fact indicates how the overcoming of the system which saw the administrative court as the setting for the annulment of an administrative act and the ordinary court for the recompense of consequential economic rights, "with its relative degrees of trial", "constitutes nothing more than the implementation of the precept of Article 24 of the Constitution", as well as Article 111 of the Constitution[29], as explicitly mentioned in the subsequent Constitutional Court judgment no. 191/2006.

The Constitutional case law just referred to is much more useful than any doctrinaire effort to dispel the myth of the specialty of the administrative court, a specialty declined in terms of a reduced or insufficient guarantee of independence and impartiality. In reality, as mentioned earlier, that contiguity with public power (and more particularly with the Government) about which so much has been written[30], if, on the one hand, appears to be greatly diminished if not dissolved now by the choice of the Ministers of the Government in power not to make use in their political staff of administrative judges (except to a very limited extent), on the other, for many years, precise rules of professional conduct have been followed for the exercise of the judicial

[28] The reference is to S. Cassese, *Verso la piena giurisdizione del giudice amministrativo. Il nuovo corso della giustizia amministrativa italiana*, 12 Gior. dir. amm. 1221 (1999). Cfr., in greater detail, A. Police, *Il ricorso di piena giurisdizione davanti al giudice amministrativo* (2000).

[29] On which we recall the writings of E. Picozza, *Il giusto processo amministrativo*, II Cons. St. 1601 (2000). Cfr., in greater detail, S. Tarullo, *Il giusto processo amministrativo* (2004); and more recently F.F. Guzzi, *Effettività della tutela e processo amministrativo* (2013).

[30] For a recent discussion cfr. L. Ferrara, *Attualità del giudice amministrativo*, cit. at 3, 565.

function[31] under the supervision of institutions of guarantee[32], as is also the case with the ordinary court[33].

4. The independent and impartial administrative court in Constitutional case law

Leaving aside the myths, then, it can be seen that the real issue is not so much to ensure the uniqueness or rather the reduction to unity of the jurisdictions, but rather to ensure the unity and effectiveness of the jurisdictional function.

And re-reading Constitutional case law will also provide confirmation of how well-founded the positions are of that part of doctrine[34] which emphasises the centrality of the need to ensure the equality and effectiveness of legal safeguards for the protection of subjective legal situations of legitimate interest on the part of the administrative court. And this is with reference both to the dynamic profiles, related to the system of actions available before the administrative court, to the means of inquiry and decision-making powers of said court and to the system of ordinary and extraordinary appeals; as well as with reference to the static profiles related to the structure and organisation of the administrative court system.

This is not the place to dwell on the dynamic profiles, but rather here it is necessary to study the static profiles of the Constitutional guarantee of the administrative jurisdiction for the protection of subjective legal situations of legitimate interest.

In the same way as for individual rights, so for legitimate interests the courts have the task of ensuring an effective compliance with the norms established by the Constitution. Hence

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[31] For further discussion allow us to return to A. Police, *Riflessioni in tema di deontologia e giustizia amministrativa*, Dir. proc. amm. 23 (2010).

[32] For further discussion allow us to return to A. Police, *Le garanzie istituzionali dell'indipendenza dei giudici amministrativi in un confronto tra diversi modelli di autogoverno*, in *Scritti in onore di Paolo Stella Richter* (2013), I, 361.

[33] This is not to say that similar doubts could not well be raised with respect to certain ordinary courts. Cfr. R. Garofoli, *Unicità della giurisdizione ed indipendenza del giudice: principi costituzionali ed effettivo sviluppo del sistema giurisdizionale*, Dir. proc. amm. 165 (1998).

[34] The reference is to the article by M. Clarich, *Quello sterile pressing sulla giustizia amministrativa che elude la sfida di far funzionare meglio i processi*, 21 Guid. Dir. (2014).

the importance of the judicial function in the civil orders intended to ensure effective, independent and impartial dispute resolution and compliance with the rules violated, in order to ensure peaceful coexistence and order in civil life[35]. The guarantee contained in Article 24 of the Constitution states firstly that only the court may grant or deny the protection, by examining the presuppositions in court. Therefore norms that directly or indirectly withdraw the "judgment" from the judicial authority, in whole or in part, violate the Constitutional precept. And it is on this point that we have to signal the first significant contribution of Constitutional case law.

With a series of decisions over a decade (from the second half of the 1960s to the second half of the 1970s), the Court declared constitutionally illegitimate a number of non-judicial organs to which the legislation prior to the Constitution had entrusted the protection of subjective legal situations of legitimate interest. As is well known, at the time the Constitution came into force there were a number of administrative bodies (provincial administrative councils and prefectural councils "in their judicial capacity", municipal and provincial councils for electoral disputes) whose survival was permitted by transitory disposition IV of the Constitution. More than 15 years after the Constitution came into force and in the absence of intervention by the legislator that would put an end to the transitional period, the Constitutional Court felt obliged to ensure that the protection of

[35] European Community case law also holds that what should be understood by jurisdictional organ is one of legal origin, with the characteristics of permanence and independence, whose jurisdiction is mandatory and whose procedure is inspired by the rule of the adversarial system and the application of legal rules: cf. EC Court of Justice of 30 June 1966, case 61/65, *Goebbles,* in Racc., 1966, 407; European Court of Human Rights, 25 September 1997, *Aydin*, in Racc., 1977, 1866. On several occasions the Strasbourg Court has ascertained violations of the "right to justice" by European states. In an interesting ruling that has affected Italy the Court considered detrimental to the "right to justice" a number of provisions regarding evictions which granted prefectures the right to carry out the same in the absence of judicial control (EC Court of Justice, 18 July 1999, *Società Immobiliare Saffi,* 25 Guid. Dir. 132 (1999). As has been pointed out by authoritative doctrine (L.P. Comoglio, *Valori etici e ideologie del "giusto processo" (modelli a confronto),* Riv. trim. dir. e proc. civ. 896 (1998) the "right to justice", sought by the Court of Justice, is part of the core of the judicial model that is part of modern constitutionalism.

legitimate interests was not further removed from the administrative jurisdiction[36].

In the same vein, although in a different period, are other decisions that, in considering the eligibility of optional arbitration, that instrument individuals are free to turn to in order to resolve disputes relating to rights available through arbiters of their own choosing, instead considered unconstitutional those provisions that imposed arbitration as a form of compulsory private jurisdiction, an alternative to the public[37]. These decisions would suggest cases relating to situations of legitimate interest are not likely to be dealt with in arbitration[38], as would seem to be confirmed today also by the provisions of Article 6 of Law no. 205 of 21 July 2000[39].

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[36] Reference is made to Constitutional Court decision no. 133/1963, on the institution of the "Minister judge" (the power of the Minister for the Merchant Navy to decide on appeals against decisions that determine the compensation for the requisition of ships); Constitutional Court decision no. 93 of 1965, on municipal councils as organs for electoral disputes; Constitutional Court decision no. 55/1966, on prefectural boards in their judicial capacity, on which cf. the note by F.G. Scoca, *Il contenzioso contabile dopo la dichiarazione di incostituzionalità dei Consigli di prefettura*, Giur. cost. 1485 (1966); Constitutional Court decision no. 30/1967, on provincial administrative councils; Constitutional Court decision no. 33/1968, on the judicial administrative council of Valle d'Aosta. Cfr. again Constitutional Court decision no. 49/1968, with a note by M.S. Giannini, *Una sentenza ponte verso i Tribunali amministrativi*, Giur. cost. (1968), and now in *Scritti* (2004), V, 925; and again Constitutional Court decision no. 128/1974, on the President of the Autonomous Consortium of the Port of Genoa deciding on the administrative measures of the organisation. Not to mention the rulings relating to jurisdictions other than administrative: Constitutional Court decision no. 60/1969, on the authority of Superintendent of Finance (but with reference to criminal jurisdiction); Constitutional Court decision no. 121/1970, on the powers of port commanders (again with reference to criminal jurisdiction); Constitutional Court decision no. 164/1976, again on the powers of port commanders, in relation to marine accidents.

[37] The reference is to Constitutional Court decision no. 127/1977 and no. 488/1991.

[38] On this point, however, cfr. M. Vaccarella, *Arbitrato e giurisdizione amministrativa* (2004), 18, which highlights a different attitude of the Court that can be inferred, for example from Constitutional Court decision no. 376/2001.

[39] Which in the second paragraph specifies: "disputes concerning individual rights devolved to the jurisdiction of the administrative court can be resolved through legal arbitration". But it does not mention – and therefore excludes – disputes relating to legitimate interests.

The legal protection is manifested in the judgment and personified in the third-party and impartial judge in relation to the parties. The impartiality and fairness of the judge lie in the absolutely equal distance of the judges from the interests that concretely pursue the individuals working within the process[40]. This guarantee must be ensured and today is also ensured to protect situations of legitimate interest on the part of the administrative court (as seen also in par. 2 above), and this is both in the configuration and the structure of the organisation and order deriving from the law establishing the Regional Administrative Courts and the Consolidated Law on the Council of State, as well as in relation to cases characterised by organisational solutions that can be considered "special", such as, for example, those organisational models specific to certain autonomous regions or provinces with special statutes[41].

Above all as regards the doubts raised concerning the guarantees of independence and the real nature of the court of the

[40] To ensure the impartiality of the judge, the system provides various instruments, such as the rules of jurisdiction, legal remedies, the rules on the judiciary etc. In this regard, for case law cfr. Constitutional Court decision no. 123/1999, in Giur. cost. 1031 (1999); and Constitutional Court decision no. 335/2002, in II Cons. St. 1090 (2002).

[41] The reference is to the Council of Administrative Justice for the Region of Sicily and the Regional Court of Administrative Justice for Trento. On this point, most recently, Constitutional Court decision no. 316/2004, according to which "the peculiar structure and composition of the Council of Administrative Justice outlined by Decree no. 373/2003 appear, therefore, fully justified, given the clarity of the principle expressed in Article 23, but also by the absence of organisational solutions established beforehand, by the intention to concretely put into practice that principle through the foreshadowing of a particular model whose specialty, following the established case law of this Court, does certainly not appear *praeter statutum*. In this regard it is important to remember that the special status of Trentino-Alto Adige (and its related implementing decree of 6 April 1984, no. 426) was inspired by the same principles of autonomy, substantially reproducing, many years later, the Sicilian organisational model based on the presence, in the organ of administrative justice, of "non-robed" members designated locally. Clearly this is a very peculiar model based on the "specialty" of a number of regional statutes which can also, in the field of judicial organisation, contain provisions in turn that are expressive of autonomy". This favourable judgment was made possible thanks to the legislative and statutory changes introduced recently, in the face instead of substantial doubts concerning constitutionality already made manifest longer ago by Constitutional Court decision no. 25/1976.

Council of State, the Constitutional Court has intervened decisively since the 1970s. In its judgment no. 177/1973[42], it pointed out that "it is undeniable that the Constituent Assembly took into account two specific needs, of wide scope: that the persons, to whom are entrusted judicial roles, are able to perform them, and that this ability is concretely established. And they, in fact, find complete or sufficient protection where various provisions affirm and recognise them as timely and essential because they will ensure to the judiciary the features that set it apart, of independence and (where applicable, and connected) impartiality. Undoubtedly in this sense, with Article 100, par. 3, according to which, specifically and in any case absorbing Article 108, par. 2, the law ensures the independence of the Council of State and its members in relation to the Government; Article 102, par. 2, final sentence, which provides for the participation in the specialised sections of the judiciary of qualified citizens who are not members of the judiciary; Article 106, par. 3, which defines the requirements and categories of people to whom can be entrusted the office of counsellor to the Court of Cassation; and, as regards their autonomy, again Article 108, par. 2, by which the law ensures the independence of the judges of the special courts and of the other persons involved in the administration of justice"[43].

Therefore, with reference to the rules governing the (partial) provision of Counsellors of State appointed by the Government, the Court stated that these rules, and in particular those of them that relate to the qualitative aspects of the choice and the guarantees and verification of the process, "should be interpreted on the basis of references and considerations of the foregoing, in the sense that they impose: a) that the choice should fall on people specifically suited to the functions and that is – borrowing the words of the opinion of the Plenary Meeting of the Council of State of 24 September 1973 and *in toto* by the text of Article 1 of Presidential Decree no. 579 of 1973 - on persons who through their occupation or legal-administrative studies carried out and their qualities of character and aptitude, fully possess the ability to perform the duties of a counsellor of state; b) that this ability is concretely established, and c) as a corollary, that, insofar

[42] Published in Giur. cost. 2348 (1973), with a historical note by C. Mortati.
[43] The reference is to Constitutional Court decision no. 177/1973.

as this is all compatible with the nature and function of the procedure and the order of appointment, the assessment of that eligibility is documented in some way or can be deduced from the context". Having thus correctly interpreted those provisions, the Constitutional Court held that they do not go against the Constitutional rules and principles mentioned above. "They give life to a legislative framework which, while giving the Government broad discretion, guarantees, with regard to the subject, compliance with the requirement of the suitability of the judge, as well as of the independence of the Council of State and its components from the Government (and at least insofar as it may arise from the exercise of the power of appointment). Acts of appointment, which in applying those rules that are in place, are subject to a control of legality by the Court of Auditors and can be brought to the judgment of the Council of State"[44].

The width of the quotation is justified because it synthesises a no-longer denied line taken by the Court in judging this issue, a line that follows an approach that is non-formalistic but attentive to the substance of things, according to an interpretation of the rules that is constitutionally directed.

And also in more recent years the Court has been shown to follow an approach linked to the substance of the issues, rather than to the enunciation of abstract questions of principle. Both with reference to possible extrajudicial assignments of the judges of the Court of Auditors[45], or more generally with respect to

[44] The reference is again to Constitutional Court decision no. 177/1973.

[45] The reference is to Constitutional Court decision no. 224/999, according to which "the Sicilian Regional Branches of the Court of Auditors, in a position of independence in terms of the regional administration, including public bodies belonging to the Region, and the administrators and officers who work in it, perform all the control and judicial functions of the Court itself: including the functions of *a posteriori* inspection of the management of the public administrations, governed by Article 3, par. 4, 5, 6 and 7 of Law no. 20 of 14 January 1994, under which, among other things, the Court verifies the pursuit of the objectives set by regional laws (par. 5), reports to the Regional Assembly on the outcome of the checks carried out, also with evaluations on the operation of the internal controls, and provides its observations to the administrations concerned (par. 6 and 7). The colleges of accountants of the regional bodies in question perform the typical functions of internal control, thus being themselves subject to "outside" evaluations by the Court of Auditors. The risk of entanglement of functions between the two orders is clear, which may result in an impairment to the independence and impartiality of the judges of the

opportunities for the scrutiny of the legality of other "special" jurisdictions[46].

It is therefore not the uniqueness of the jurisdiction that constitutes the unfailing Constitutional principle, but rather unity as a rule for the exercise of the judicial function. And the

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regional sections of the Court, because of the necessary institutional presence of judges, belonging to the same sections, in the area, and even on the boards and organs of the regional bodies. On closer inspection, the provision for entrusting such assignments only to magistrates of the Sicilian sections of the Court, contained in the contested dispositions, does not have the meaning and scope of a simple choice of suitability for organisational reasons, but expresses a line of institutional involvement by those sections, through the magistrates involved in them, in an activity of internal control within the framework of the regional administrations, in turn then subject to the institutional powers of control exercised by the same sections. It is no coincidence, in fact, that this is not an isolated and occasional choice, but corresponds to a line of institutional policy applied systematically in the discipline of the organisation of regional bodies in Sicily: the contested provision in Article 5 of Law no. 25 of 1976 refers to a category of bodies (inter-company centres for professional training in industry); the likewise contested provision, of Article 15, par. 1, of Regional Law no. 212 of 1979 refers to four regional bodies; the same provision is provided for two other regional bodies in par. 3 of Article 15; an identical provision is found, referring to other bodies, in other regional laws (cf. e.g. Article 6, par. 1, of Regional Law no. 50 of 21 December 1973, regarding the colleges of auditors of three bodies). Though such a line can correspond to the intention of the regional legislature, in itself commendable, to impart a character of seriousness and "neutrality" to the internal control of the bodies, through the presence of the professionalism that is typical of accounting magistrates, this does not eliminate the "contamination" between internal and external controls, which can be achieved through the systematic allocation of tasks of internal control, conferred and paid for by the Region or by regional bodies, to many of the same judges who operate institutionally in the same geographical area, in the organ of external control. The territorial limitation, in this case, translates into an obstacle to the exercise of the tasks of safeguarding the independence and impartiality of the magistrates, entrusted to the Presidential Council, which is responsible, for these very purposes, for deliberating on the assignments, and that could not prevent, not so much on single occasions (for which it could always exercise its power to concretely refuse a designation), but systematically, which creates the risk of entanglement mentioned above, which is dangerous for the independence of the Court and its magistrates. It must therefore be concluded that the provisions are unconstitutional, being contrary to Articles 100, par. 3, and 108, par. 2, of the Constitution, insofar as they limit to magistrates serving in the Sicilian regional sections the choice of accounting magistrates on whom may be conferred the positions in question".

[46] The reference is to Constitutional Court decision no. 284/1986.

Constitutional Court is well aware of this and has given a significant reading to it in questioning the scope and limits of exclusive jurisdiction.

The Constitutional Court, in fact, found that the "particularity" of the matters of exclusive jurisdiction referred to in the Constituent Assembly is nothing more than the reference to that particular type of dispute in which the "safe and necessary coexistence or cohabitation … of positions of legitimate interest or individual right linked by an inextricable Gordian knot" made it so difficult to make a distinction to justify the derogation from the traditional criteria of allotment. A thesis which was also espoused during the work of the Constituent Assembly by Ruini, according to whom – as also remembered in the judgment – because of "the inseparability of the issues of legitimate interest and individual right, and the prevalence of the former" the need has emerged to "add the competence of the Council of State for the rights of individuals, in the particular matters specifically provided for by law"[47].

The Constitutional Court stated therefore that the particularity of the matters assigned to exclusive jurisdiction implies that such matters "must share in the same nature" as those devolved to the general jurisdiction of legitimacy "which is marked by the fact that the public administration acts as the authority against which protection is granted to citizens in the administrative court".

This solution has been heavily criticised in doctrine, to the extent of casting doubt on the very existence of exclusive jurisdiction[48]. This is not the place to dwell on this point. For the

[47] The reference is to Constitutional Court decision no. 204/2004.

[48] Among the many comments cfr. those of F.G. Scoca, *Sopravvivrà la giurisdizione esclusiva?*, Giur. cost. (2004); V. Cerulli Irelli, *Giurisdizione esclusiva e azione risarcitoria nella sentenza della Corte costituzionale n. 204 del 6 luglio 2004*, Dir. proc. amm. (2004); R. Villata, *Leggendo la sentenza n. 204 della Corte Costituzionale*, Dir. proc. amm. (2004); L. Mazzarolli, *Sui caratteri e i limiti della giurisdizione esclusiva: la Corte costituzionale ne ridisegna l'ambito*, Dir. proc. amm. (2005); M. Clarich, *La "tribunalizzazione" del giudice amministrativo evitata*, Gior. dir. amm. (2004); A. Pajno, *Giurisdizione esclusiva ed "arbitrato" costituzionale*, Gior. dir. amm. (2004); A. Travi, *La giurisdizione esclusiva prevista dagli artt. 33 e 34 del d. leg. 31 marzo 1998, n. 80 dopo la sentenza della Corte costituzionale 6 luglio 2004, n. 204,* I Foro it. (2004); F. Fracchia, *La parabola del potere di disporre il*

purposes of this short essay it is sufficient to recall how the reading that the Court provides overall of administrative jurisdiction, and that still today justifies its specialty, lies in the Constitutional configuration of the administrative court as a judge of public power. This reading was then taken up by the legislator in Article 7 of the Code of Administrative Procedure[49]. And indeed the administrative judge within their jurisdiction is not in any way, if they ever were, a special judge; we should more properly highlight with the law that in matters where what is disputed is the exercise or non-exercise of public power, the administrative court is the only ordinary court, the natural court also referred to with fiery passion in doctrine[50].

5. Beyond the myth, a conclusion regarding the real problems of justice in relation to the public administrations

If Constitutional case law has helped us reshape the mythological import of certain themes, those of the uniqueness of the jurisdiction and the specialty of the administrative court (or its structural bias), this does not mean that there is not a significant third theme for investigation, among those which were enumerated at the start of this paper; the reference is to that which urges the verification of the current system of safeguards against the public administration that the law assigns to the administrative court, or rather its incompatibility with the needs of a modern society and a global economy.

The theme, as noted, has been repeatedly brought up in the context of political debate and deserves thoughtful reflection. If, in fact, a not insignificant part of this debate is fuelled by the natural irritation and inevitable impatience with the counter-limits on the part of the public authorities and the executive power in particular, it would be very short-sighted on the part of the institutions of guarantee not to notice the existence of some real

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risarcimento: dalla giurisdizione esclusiva alla giurisdizione del giudice amministrativo, I Foro it. (2004).

[49] On this point, cf. N. Paolantonio, *Commento all'art. 7,* in R. Garofoli & G. Ferrari (eds.), *Codice del processo amministrativo* (2010), 81.

[50] Cfr. M. Mazzamuto, *Per una doverosità costituzionale del diritto amministrativo e del suo giudice naturale*, Dir. proc. amm. 156 (2010).

problems and not to recognise the justified reasons that sometimes nurture controversies of a simplistic or populist tone.

In fact it cannot be denied that the exercise of the judicial function against public administrations has contributed in a substantial way in recent years to generate an unwelcome instability in public decision-making; those decisions which insofar as a result of the exercise of public power are precisely the object of administrative proceedings.

The destructive result of a sentence of annulment, a typical remedy consequent to a review of legitimacy of the administrative court (but the discussion has recently also shifted to the judgment on the legitimacy of laws by the Constitutional Court), creates the feeling that the administrative court is an obstacle to the timely adoption of measures that are necessary to protect collective interests. The pages of the newspapers are full of arguments about the supposed responsibility of the administrative courts for the failure to complete works of environmental reclamation in polluted areas or those affected by hydrogeological problems, or for the flight of foreign investors from projects for the construction of plants for power processing or generation, or again for the failure to set up extensive networks of public services (from the distribution of electricity and gas to high-speed rail), or for the interruption in the delivery of public services.

It is quite clear that blaming the judicial function for the harmful effects of illegitimate (if not illegal) administrative activities is inappropriate, but, in certain circumstances, there is a striking disproportion between the usefulness of the remedy (the guarantee of legitimacy in the exercise of the public function) and the damage resulting from the effects produced by the exercise of this remedy is a finding that cannot be denied. There is (and there is no point hiding it) an issue of proportionality and adequacy regarding the effects of the destructive remedy compared to the public or collective interests related to the public decision that was taken.

To address this issue, in the past the administrative court has sometimes exposed itself to the criticism discussed in the preceding pages, according to which it would manifest a substantial bias towards the public body to the detriment of the

protection of individuals[51]. In reality, the court far from altering the position of parity of the parties in the judgment has imagined a number of possible solutions to ensure adequacy and proportionality between the general effects of its judgment and the request for compensation for the damages of the individuals covered by the judgment.

Examples of this are the insights for the delisting of the vices of formal legitimacy of administrative actions, which was later implemented by the legislature in general terms[52], both with regard to the vices of public tenders (and the consequent effects on public contracts)[53], or rulings to defer or modulate over time the effects of judgments of annulment[54], or, lastly, the attempt to remove Constitutional protection itself as speculated about in a recent referral order to the Plenary Meeting of the Council of State[55].

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[51] On this point cf. also the reflections of S. Battini, *La giustizia amministrativa in Italia: un dualismo a trazione monista*, Riv. trim. dir. pubb. 47 (2013).

[52] This is not the place to dwell on this point, but allowed us to refer once again to A. Police, *Annullabilità e annullamento*, I Enc. Dir. Ann. 49 (2007).

[53] We refer to Articles 119 ff. of the Code of Administrative Procedure. On which see N. Paolantonio, *Commento al Libro quarto Titolo quinto*, in G. Leone et al (eds.), *Codice del Processo Amministrativo* (2010), 876; R. Giovagnoli, *Commento* agli artt. 119 e 120, in A. Quaranta & V. Lopilato (eds.), *Il processo amministrativo* (2011), 980; R. De Nictolis, *Commento agli artt. 121-125*, in A. Quaranta & V. Lopilato (eds.), *Il processo amministrativo* (2011), 1013; S. Morelli, *Commento all'art 119*, in E. Picozza (ed.), *Codice del Processo Amministrativo* (2010), 228; C. Sgubin, *Commento agli artt. 120-125*, in E. Picozza (ed.), *Codice del Processo Amministrativo* (2010), 232; R. Chieppa, *Il Codice del processo amministrativo* (2010), 562; P. Lignani, *Commento all'art. 119*, in R. Garofoli & G. Ferrari (eds.), *Codice del processo amministrativo* (2010), III, 1635; G. Ferrari, *Commento agli artt. 120-125*, in R. Garofoli & G. Ferrari (eds.), *Codice del processo amministrativo* (2010), III, 1649; M. Lipari, *Commento all'art. 119*, in F. Caringella & M. Protto (eds.), *Codice del nuovo processo amministrativo* (2010), 1090; S. Cresta, *Commento agli artt. 120-125*, in F. Caringella & M. Protto (eds.), *Codice del nuovo processo amministrativo* (2010), 1118.

[54] Reference is among others to the Council of State, Sect. VI, May 10 2011, no. 2755, with comment by M. Clarich, *L'annullamento degli atti non è sempre retroattivo*, Il Sole 24Ore - Norme e Tributi (7 June 2011).

[55] The reference is to the Council of State, Sect. V, January 22, 2015, no. 284, with highly critical comments by M. Mazzamuto, *Dalla dequotazione dei vizi "formali" alla dequotazione dei vizi "sostanziali", ovvero della dequotazione* tout court *della tutela costitutiva*, Giustamm.it (2015).

Part of the doctrine and the Plenary Meeting itself[56] did not welcome this solution favourably but, leaving aside the reasons for a more traditional reading, there is no doubt that the real question remained unanswered, the real and main problem of judicial protection against the public administrations. And this is a problem, as can be seen, irrespective of what court is called upon to review the legality of administrative measures[57].

So if we really want address the real problems of justice in terms of the public administrations, or at least the most urgent, we believe it to be more constructive for scholars, as well as for judges, to dwell on the possible evolution of safeguards, without setting off in the vain search for "brief and vanishing dawns"[58], among which the legitimate aspiration to unity of jurisdiction is very much at home.

[56] The reference is to the Council of State, Plenary Meeting, April 13, 2015, no. 4.

[57] Always assuming we do not want to solve the problem with a ban, similar to the one that for 150 years still exists for the ordinary courts (the reference, of course, is to Article 4, par. 2, of Law no. 2248, Ex. E of 20 March 1865 ,) and which of course would be in stark contrast with Article 113, par. 2 of the Constitution.

[58] In the words of M.S. Giannini (*Administrative Law* (1988), Preface), there where he "sadly" confesses that "at the age where time has led me there open neither prospects of shipwrecks or expectations of regeneration, although the condemnation of jurists is to always think of new dawns. But they are brief and vanishing dawns".